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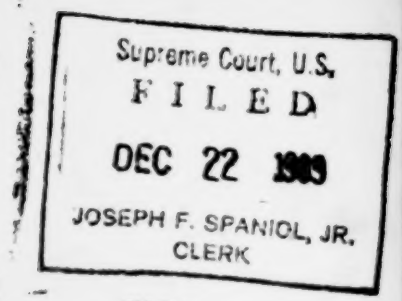

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

ANNY NEWMAN

V.

DIANA BURGIN, RICHARD M. FREELAND,
ROBERT A. GREENE and ROBERT CORRIGAN,
INDIVIDUALLY AND IN THEIR CAPACITIES
AS OFFICERS OF THE
UNIVERSITY OF MASSACHUSETTS, BOSTON

PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE
FIRST CIRCUIT

Francis X. Nee
141 Tremont Street
Boston, MA 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.
141 Tremont Street
Boston, MA 02111
(617) 426-4766

QUESTIONS PRESENTED

Even though there were disputed issues of fact material to the sanctions invoked against this tenured state university professor for plagiarism, the lower court held that the university officials were entitled to summary judgment on their qualified immunity defense.

1. Can the "objective legal reasonableness" standard for officials' qualified immunity be legally established just because the situation confronting them was disputed or essential facts uncertain?

2. When a jury could infer that these officials had a pre-ordained intent to sanction this petitioner, did that ultimate disputed fact foreclose ruling on summary judgment whether the officials reasonably could know if they were being "arbitrary and capricious" (which the court held was the clearly established legal standard)?

LIST OF PARTIES

The Court may note that the lower court caption lists the Commonwealth of Massachusetts as a defendant-appellee in that court, but that is an error. The caption of the case in this Court contains the names of all parties. Rule 21.2(b).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Anny Newman, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals For for the First Circuit, originally entered on August 28, 1989, on which a duly filed Petition For In Banc Consideration Or Rehearing was then denied on September 25, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 884 F.2d 19 (1st Cir. 1989), the decision of the United States District Court for the District of Massachusetts was not reported, but copies of both opinions appear in the "separately presented" Appendix hereto.[1]

JURISDICTION

The United States Court of Appeals for the First Circuit denied petitioner's timely-filed Petition For In Banc Consideration Or Rehearing on September 25, 1989 (App. 27), so this petition is timely filed, in accordance with the provisions of Rule 20.2 and .4. The jurisdiction of this Court is invoked under 28 U.S.C.§1254(1).

CONSTITUTIONAL PROVISION AND STATUTE

Section 1 of Amendment XIV to the Constitution of the United States of America, 14 Stat. 358 and 15 Stat. 705-707, and 42 U.S.C. §1983, are set out in the Appendix, page 29.

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1 Because the opinions are relatively "voluminous", they are "separately presented" in the Appendix hereto filed herewith, as per Rule 21.1(k), and the Appendix will be hereinafter cited as "App. ___."

STATEMENT OF THE CASE

The plaintiff, an internationally respected scholar and a tenured member of the Russian Department of the University of Massachusetts, was publicly censured and denied certain academic privileges because of supposed plagiarism in an article of hers about a 17th-century Serbo-Croatian poem. She brought this action in the United States District Court for the District of Massachusetts in 1986 against several of the persons involved in that administrative university decision, alleging violations of her substantive and procedural due process rights under both the federal and state civil rights laws. See 42 U.S.C. §1983; Mass. Gen. Laws Ann. ch. 12, §11 I.

It all began during a routine meeting of the Russian Department Personnel Committee's annual review of another professor. The defendant, Burgin, who was then the Chairman of the Russian Department, was not a member of the Personnel Committee but was, inappropriately, present. There was a long history of Burgin's personal animosity toward the plaintiff--such that it was "part of the folklore of the institution", as the Dean, the defendant, Richard M. Freeland, admitted at a deposition. Suddenly, with no prior notice to the plaintiff that it would arise,

a member of the Committee told the plaintiff that it had been brought to his attention by his friend, Burgin, that the plaintiff had apparently plagiarized in a recent article of hers from a prior German text by one Setschkareff.[2] The plaintiff told the Committee that that was nonsense, explaining (something Burgin and the Committee until then had not known) that her article was but a revision of her Harvard master's thesis from twenty years before; that the world-renowned authority who was her thesis advisor then had assigned the Setschkareff text to use as a source and model for the thesis; that she had worked with Setschkareff himself in preparation of the thesis, as he was her Harvard professor of Russian literature at the time; and that her expert advisor highly praised her thesis, considering it of such merit that it was cataloged in Harvard's Widener Library where it had been available for the use of scholars for twenty years--all with no one, least of all the author supposedly plagiarized, ever raising any question of plagiarism. The Committee said they

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2 Only one member of the Committee could read German, not including Burgin, and no one on the Committee read Serbo-Croat (the language of the poem that was the subject of the article and the relevant parts of the German test) or knew anything about the field of scholarship.

would await a written response from the plaintiff before taking any action.

But the Committee did not wait, they reported orally the accusation of plagiarism to the defendant, Dean Freeland. He invited the plaintiff to submit a detailed written Refutation of the charge, which she did. It contained the details of the article being but a revision of her thesis, now that she had a better command of English, described the context--the scholarly imprimatur the thesis had received, constituting fair and authorized use of Setschkareff's test--and she detailed and explained the scholarly Serbo-Croat reasons for the apparent linguistic similarities, all refuting the charge of plagiarism. Dean Freeland decided that he would ignore applicable university regulations specifying several required protections as preliminaries to any action on his part, and would submit only plaintiff's article and parts of the Setschkareff text to two outside academics he had selected and ask them if there was plagiarism, but he refused to send them plaintiff's written Refutation. Plaintiff specifically objected to both of the Dean's procedures, pointing out that there was no fair reason to make this charge the only exception to established university procedures (the

utilization of which could obviate any action by him), and that it was patently unfair to keep her Refutation secret from the two scholars, because the context was necessary fairly to assess if this was plagiarism at all, wherein intent is a vital element.[3]

Dean Freeland admitted that the resolution of the plagiarism charge was a "major personnel action", as it entailed potential dismissal, and the university regulations (the, so-called, "Red Book") applied to "major personnel actions", such as appointment or tenure, but Dean Freeland refused to apply the usual "Red Book" procedures to plaintiff's case.[4] Three of those procedures would have afforded the plaintiff meaningful protections at the critical early stages of administering this charge (what Freeland admitted was "the most serious of academic offenses"):

> 1. she was entitled to have been notified by the Department Chairman that the charge of plagiarism was going to be made at the faculty level and the prospective report of the charge to the Dean;

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3 It was essentially admitted in the course of discovery that intent is accepted as a definitional element of plagiarism, that there must be an "intent to deceive."

4 When pressed about this anomaly during his deposition, he pointed out that a plagiarism charge was not specified in the "Red Book", like "appointment, reappointment, promotion and tenure", so he regarded the usual "Red Book" procedures as "irrelevant", "immaterial" to this matter.

> 2. she was entitled to have included in her file transmitted to the Dean and used in the determinative procedures any and all materials which she believed would be essential to an adequate consideration of her case; and
>
> 3. she was entitled to be informed of the prospective Department recommendation to the Dean.

All of these protections were ignored, the defendant Greene, the Provost of the university, even admitting that he knew of no other case of a scholarship matter wherein the Dean was afforded such sparse documentation.

Dean Freeland gave the plaintiff the written assurance that "[his] continuing goal...[was] to assure that the procedures followed in this matter at every step are entirely in accord with fundamental principles of fairness and due process for you...." When asked at his deposition why he had not therefore supplied the two outside scholars with the plaintiff's detailed Refutation of the plagiarism charge, he said he could not have done that "without also making them aware of a number of contextual circumstances which [he] thought would have potentially influenced their professional judgment"!

The plaintiff claimed and the record supported that the defendants also committed subsequent violations of due process

in reaching the ultimate decision that she should be sanctioned. Although no one of them is as substantively and independently effective as these first two, they are summarized because they pertain to plaintiff's comprehensive and most important substantive due process claim:

> having little more to go on then the Personnel Committee oral accusation of plagiarism (Dean Freeland could not read German), it was arbitrary and capricious for him to initiate an administrative investigation of the charge entailing the possible dismissal of a tenured professor or one who could remain, with a shredded reputation;
>
> in violation of established University practices, when outside scholars were necessary to assess a matter of scholarship, the plaintiff was denied any say as to who the outside scholars would be, denied disclosure to them of her identity, and denied their participating as ex officio members of a Department committee to determine the matter of scholarship in issue;
>
> Dean Freeland consulted with Provost Greene throughout the year and a half of administrative procedures in this matter, when Greene would be the higher (appellate level) official to whom Freeland would make any recommendation of sanctions--Freeland admitting that "since [Greene] was involved at every point along the way...it was quite unlikely that he would then change his mind";

> the ad hoc faculty committee constructed to hear the matter exceeded the one issue it was authorized to decide (was there plagiarism here), to find that while the plaintiff had not committed "plagiarism", she had indulged in the transgression (admittedly invented by the committee), of "objective plagiarism" (i.e. unintentional) and exhibited "seriously negligent scholarship", and to reach those conclusions the committee relied upon the opinion of one expert witness and ignored the overwhelming weight of all the other evidence;
>
> Dean Freeland had an ex parte conference with some members of the ad hoc committee after its written decision was handed down, because he "wanted to know why didn't [they] see intentional plagiarism"; and
>
> directly contrary to the ad hoc committee's recommendation to Dean Freeland "that no further action be taken", he recommended broad-ranging severe sanctions to the university administration, which were in due course imposed.[5]

Lastly, the plaintiff claimed that if no one of these actions or inactions constituted in and of itself a denial of procedural or

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[5] Those sanctions included a letter of censure "in the strongest possible terms" "for an act of 'objective plagiarism' and for 'seriously negligent scholarship'" to be sent to everyone in the university concerned with the matter, read to meetings of the Faculty Council and the College Senate, and placed in the plaintiff's "permanent file"; notification of the censure to be sent to Harvard University and the German publishers of plaintiff's article; and denial for five years of any participation by the plaintiff in usual Department affairs except teaching.

substantive due process, in aggregate there is a compelling inference that sanctions against her were "pre-ordained", "pre-determined" by the defendants' various unfair procedures, intended all along, and that such a "railroading" is a definitional example of "arbitrary and capricious" action and, hence, a violation of substantive due process.

After discovery, the defendants moved for summary judgment on the ground of qualified immunity (the only one with remaining relevances), the plaintiff maintained that there were many "genuine issues of material fact" barring such relief, and the District Court denied the motion (App. 1-2).[6] The defendants duly prosecuted an interlocutory appeal of the summary judgment denial, properly restricted by the Court of Appeals to their "qualified immunity" defense, and the Court of Appeals reversed the District Court, holding that because there was "uncertainty" as to whether a reasonable university official reasonably could have known that plaintiff's due process rights

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6 While the District Court's Order is only four sentences long, does not specify the defendants' qualified immunity argument, and mentions only the failure to send plaintiff's Refutation to the outside scholars as a disputed issue, on appeal the parties and the Court of Appeals considered that the qualified immunity defense and all the disputed facts argued had been implicitly determined by the District Court.

were violated by the actions and inactions in this case, these defendants were entitled to summary judgment (App. 3-26). The plaintiff duly filed a Petition For In Banc Consideration Or Rehearing, maintaining that the court had not utilized the correct standard of review and that its decision was contrary to opinions of this Court, other Circuits, and other First Circuit opinions (the arguments essentially now delineated herein as reasons to grant this writ). The Petition was denied on September 25, 1989, "a majority of ["the judges of the court in regular active service"] not having voted to order that the appeal be heard or reheard by the court inbanc" (App. 28). This Petition is now timely filed.

REASONS FOR THE ALLOWANCE OF THE WRIT

Both of the issues presented were constructed by the lower court's erroneous opinion and constitute equally valid reasons to grant this petition. They will be discussed seriatim.

1. When Disputed Issues Of Fact Are Essential To A Court's "Objective Reasonableness" Inquiry, The Defense Of Qualified Immunity Cannot Be Determined On Summary Judgment.

The Court has not yet had to address the question of how courts are to determine, pre-trial, if an official is entitled to qualified immunity under the "objective legal reasonableness" standard of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), when disputed issues of fact are essential to that question of law. Neither in that genesis opinion, nor in the subsequent developmental *Mitchell-Malley-Anderson* trilogy,[7] was the question directly presented--as Justices Stevens, Brennan and Marshall recognized, dissenting in *Anderson v. Creighton*, 483 U.S. 635 (1987) at 655 n. 10: "the possibility that the 'objective reasonableness' of the officer's conduct may depend on the resolution of a factual dispute [and that] [s]uch a dispute may

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7 *Mitchell v. Forsyth*, 472 U.S. 511 (1985); *Malley v. Briggs*, 475 U.S. 335 (1986); *Anderson v. Creighton*, 483 U.S. 635 (1987)

preclude the entry of summary judgment...." Here, the lower court ignored disputed facts essential to the "objective legal reasonableness" decision, and this case is an appropriate vehicle for the Court now to make explicit what is implicit in its previous opinions.

In *Harlow*, the Court recognized from the beginning that the "objective reasonableness" inquiry would "permit the resolution of many insubstantial claims on summary judgment", *Id.* at 818--not all. Concurring, Justices Brennan, Marshall and Blackmun specified: "that given this standard, it seems inescapable...that some measure of discovery may sometimes be required to determine exactly what a public-official defendant did 'know' at the time of his actions." *Id.* at 821. In *Anderson v. Creighton, supra*, both the majority and dissenting opinions more specifically recognized that the question of law as to whether the "reasonable officer could have believed the search to be lawful", turned upon "the circumstances with which Anderson was confronted", *Id.* at 640-41; that "the determination whether it was objectively legally reasonable...will often require examination of the information possessed by the searching officials", Id. at 641; "whether the

situation that the officer confronted fits within the ["clearly established"] category." *Id.*, at 651, n. 3. (Emphasis supplied). Justices Stevens, Brennan and Marshall were particularly prescient in their *Anderson* dissent, at 656, n. 12:

> The principle is clearly established ["such as the command of due process or probable cause"], but whether it would brand the official's planned conduct as illegal often cannot be ascertained without reference to facts that may be in dispute.

Here, the lower court proceeded to determine the "objective reasonableness" question of law undeterred by the fact that the "circumstances", "the situation that the officer confronted", was very much a disputed issue of fact. The issue is here nicely focussed. Take the all-important claim that Dean Freeland violated the plaintiff's due process rights by refusing to send her explanatory Refutation to the two outside scholars.[8] It was an uncontradicted subsidiary or "conduct" fact that Freeland refused to send the Refutation to the scholars--kept secret from them plaintiff's plagiarism defense. But the legal decision as to

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8 Per the facts most favorable to the plaintiff, both the University "Red Book" regulations and the established practice of fully advising any "outside scholars" called in on a scholarship question of any materials the faculty member thought necessary to her position would have required these two Serbo-Croat scholars to be given plaintiff's Refutation.

whether it was "objectively reasonable" (or a violation of both procedural and substantive due process[9]) to withhold plaintiff's Refutation, her "side of the story", could not be made without

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9 Not sending plaintiff's Refutation was a violation of both procedural and substantive due process. With a procedural focus, this court has held:

> A fundamental requirement of due process is "the opportunity to be heard"....It is an opportunity which must be granted at a meaningful time and in a meaningful manner.

Armstrong v. Manzo, 390 U.S. 545 at 552 (1962).

> [I]f the initial view of the facts based on the evidence derived from non-adversarial processes as a practical or legal matter foreclosed fair and effective consideration at a subsequent adversary hearing leading to ultimate decision, a substantial due process question would be raised.

Withrow v. Larkin, 421 U.S. 35 at 58 (1975). And the "opportunity...to present [one's] side of the story" is required whether the issue is <u>if</u> discipline is appropriate or <u>what</u> discipline is appropriate. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 at 546. The lower court here recognized that that procedural due process rule was "clearly established" (App. 10-14), as well as the alternative substantive due process mandate that defendants' actions could not be "arbitrary and capricious" (App. 15-19). The importance of the Refutation is demonstrated by the fact that when the plaintiff later gave the two scholars her Refutation, one reversed his initial position and advised the University that he never would have opined that there was plagiarism if he had been given the Refutation at the start, and the fact that the other expert who did not change his position was the only evidence against the plaintiff at the subsequent hearing (only proving again Emerson's precept that "mindless consistency is the hobgoblin of little minds").

knowing whether it should have been sent--what "the situation" was confronting Freeland--and that was a starkly disputed fact. The plaintiff's evidence was that Freeland was required to send it, while Freeland claimed that he was not.[10] The lower court implicitly recognized that it was a disputed fact, but vaulted o'er it to decide the ultimate question of law. The court twice held: that "Freeland reasonably could have viewed the expert evaluations [by the two "outside scholars"] as a preliminary, rather than critical stage of the proceedings"; and "we have no doubt that defendants would be entitled to qualified immunity because of the uncertainty over whether the university procedures apply in the circumstances of this case" (App. 14; 21, n. 9) (Emphasis supplied). The court was either holding that because the essential fact of whether the Refutation should have been sent was "disputed"--because there was "uncertainty"--that equated to "objective reasonableness" as a matter of law, or

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10 Given Freeland's deposition testimony, it may be elevating patent pretext to say that he denied that it should have been sent (it "would have potentially influenced their professional judgment"; he considered the usual "major personnel action" procedures to be "irrelevant or of marginal importance"), but petitioner will accept that testimony as characterizable as a denial for instant purposes. Note also, that this disputed fact was the reason specified here by the District Court to deny summary judgment (App. 1).

the court implicitly resolved the disputed fact in favor of Freeland, the party moving for summary judgment. Either holding constitutes patent error, as was detailed to the court in the inbanc petition.

The latter interpretation would be in blatant violation of the mandate of Fed.R.Civ.P. 56, that the court "look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Harlow v. Fitzgerald, supra,* at 816; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).[11] Implicit in the Court's *Harlow-Mitchell-Malley-Anderson* quartet is the recognition that as important as is the policy for pretrial qualified immunity decisions, Rule 56 still applies with its usual effect. So too, those decisions of this Court implicitly recognize (as detailed above) that if the "situation" or "circumstances" confronting the official include essential facts that are disputed, "objective reasonableness" cannot be determined, and summary judgment

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11 Such a construct would ordinarily seem impossible to posit (that the facts could have been viewed "in the light most favorable to" Freeland), but nowhere in the lower court opinion is Rule 56 alluded to or the proper standard of review, and in *DeAbadia v. Izquierdo Mora,* 792 F.2d 1187 at 1205 (1st Cir. 1986), another qualified immunity-summary judgment case, Judge Torruella in dissent accused another First Circuit panel decision of "virtually amend[ing] Rule 56."

may not be granted.The first view of the lower court's holding is equally erroneous. "Uncertainty" as to an essential "circumstances" fact does not equate to "objective reasonableness" as a matter of law. While the lower court did nof make explicit that it was making that equation, it is an obvious reading and it echoes a previous decision of another First Circuit panel in *DeAbadia v. Izgnierdo Mora*, 792 F.2d 1187 (1st Cir. 1986), wherein Senior Judge Aldrich held, at 1193:

> Indeed, to labor the point, the very fact that there is a reasonable dispute means that, from the standpoint of qualified immunity, the law was not clearly established in plaintiff's favor.

The authority for that errant proposition is given as *Tubbesing v. Arnold*, 742 F.2d 401 (8th Cir. 1984), wherein the court held that "the fact that the application of the Policy Manual [to the directors] is disputed merely emphasizes that the law...was not clearly established." *Id.* at 406. (Cert. was not sought in either case.) The First and Eighth Circuits, therefore, have both misperceived the implicit teachings of this Court and promulgated dangerous contrary decisions.

The lower court's decision is also in conflict with decisions o f other Circuits, which have correctly recognized that when facts are disputed which are essential to knowing what "circumstances" or "situation" the official faced, summary judgment must be denied. Exemplary, is the case of *Waldrop v. Evans*, 871 F.2d 1030 (11th Cir. 1989), wherein the particular medical care given the plaintiff prisoner by one defendant doctor was "undisputed" (here, undisputed that Freeland did not send the Refutation), but it "remain[ed] a contested issue" of fact, after conflicting expert testimony, whether the treatment afforded complied with "reasonable professional skill and care" or was "deliberately indifferent medical care" (like here, whether Freeland should have sent the Refutation). Summary judgment was properly denied because the defendant prison doctor "failed to establish the absence of disputed issues of fact." In this case, the lower court's insensitivity to Rule 56 and the fundamental relevance of a disputed issue of fact about the "circumstances" worked a contrary result. For other Circuit opinions in direct conflict with this lower court decision *see:Geter v. Fortenberry*, 882 F.2d 167, 170-171 (5th Cir. 1989) (disputed "circumstances" made it impossible to determine qualified

immunity on summary judgment); *Pleasant v. Lovell*, 876 F.2d 787, 794 (10th Cir. 1989) ("constitutional implications of facts differ, depending upon which version [of the material events] is correct", so summary judgment is precluded on qualified immunity); *Williams v. Lane*, 851 F.2d 867, 882 (7th Cir. 1988) (since there was a dispute as to defendants' "justification" [albeit "shallow" and pretectual] for depriving plaintiff of clearly established rights, qualified immunity could not be established on summary judgment); *Harris by and through Harris v. Maynard*, 843 F2d 414, 417-418 (10th Cir. 1988) (defense of qualified immunity rejected and case allowed to go forward for discovery where significant factual disputes existed as to the circumstances of inmate's death); *Dominque v. Tebb*, 831 F.2d 673, 677 (6th Cir. 1987) (disputed facts would on remand defeat summary judgment); *Martin v. Malhoyt*, 830 F.2d 237, 263 (D.C. Cir. 1987) ("Without resolving the factual dispute as to what actually transpired", the court could not determine that the defendant "established the requisite objective reasonableness

of his actions").[12]

Since the lower court decision is "in conflict with applicable decisions of this Court" and "with decision[s] of [other] federal court[s] of appeals" on this important and recurring question, Rule 17.1, further clarification would provide a boon and help to avoid further unjust mischief, such as here occurred. One final caveat: the Court can see that making explicit that disputed "situation" or "circumstances" facts obviates summary judgment in qualified immunity cases will not constrain or unduly limit the underlying policy of protecting many officials from having to stand trial. In most cases these essential facts will not be genuinely disputed. The "probable cause" issue can be decided, for instance, in any warrant application case, since the "circumstances" will be as they are described "within the four corners" of the affidavit.

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12 Ironically, a case clearly recognizing the rule petitioner here espouses, and directly contrary to the lower court's decision, is *Unwin v. Campbell*, 863 F.2d 124 (1st Cir. 1988), by a different First Circuit panel. (Maybe that explains why only "a majority of" "the judges...in regular active service" did not vote inbanc review [App. 28].) The court held on page 136, that "objective reasonableness" "cannot be resolved in this case on summary judgment" because there was "a genuine issue of material fact as to whether a 'prison disturbance' as described in *Whitley* [*Whitley v. Albers*, 475 U.S. 312 (1986), establishing the context for permissible force], actually existed....construed in the light most favorable to *Unwin*....". *See also Emery v. Holmes*, 824 F.2d 143 (1st Cir. 1987).

2. Because It May Be Inferred From The Litany Of Defendants' Unfairnesses That Sanctioning The Plaintiff Was Their Pre-ordained Intention, The "Objective Reasonableness" Issue Merged With The "Arbitrary And Capricious" Ultimate Liability Issue And Summary Judgment Was Impossible.

The Court has yet to address an important issue which can arise, pre-trial, in some qualified immunity cases. In this case it was starkly presented. The *Anderson* dissenters put it thusly: a "type of case" where the *Harlow* "purely objective standard" "may be inapplicable" is when "the plaintiff can only obtain damages if the official's culpable state of mind is established." *Anderson v. Creighton, supra*, at 656, n. 12. The Courts of Appeal have (with the single exception of the opinion in this case) recognized that "objective legal reasonableness" cannot be determined on summary judgment when a defendant's "intent" or "state of mind" is an essential element of plaintiff's constitutional claim. *Feliciano-Angulo v. Rivera-Cruz*, 858 F.2d 40, 44, 47-48 (1st Cir. 1988) (the "intent motivating the official's conduct", "the principal disputed issue of fact in the case", was "a predicate to any meaningful qualified immunity analysis", so the court "was in no position to grant summary

judgment"); *Turner v. Dammon*, 848 F.2d 440, 444-445 (4th Cir. 1988) (when defendants conducted 100 administrative searches of plaintiff's bar over a year, even though the "motive or intent" or validity of each particular search was not in issue, summary judgment was foreclosed because the "disproportionate number" of the "series of bar checks" could inferably be found by a jury to constitute an ultimate unconstitutional "pattern of harassment"); *Schwartzman v. Valenzuela*, 846 F.2d 1209, 1212 (9th Cir. 1988) (summary judgment on qualified immunity denied because a jury could infer from the subsidiary facts that the defendants had a "retaliatory motive" in terminating the plaintiff); *Allen v. Scribner*, 812 F.2d 426, 436 (9th Cir. 1987) (another allegedly unconstitutional firing case, the court denying summary judgment because "[a] jury must decide the issue of motivation").

In this case the plaintiff's most fundamental substantive due process claim, argued throughout her brief, was that the aggregate of the defendants' unfairnesses, from when her known antagonist levelled the plagiarism charge until the sanctions were accomplished, would permit a jury to infer that

sanctioning her was the defendants' "pre-ordained" or "pre-determined" intention. The very "disproportionate number" of various continuing unfairnesses made it a compelling inference that the defendants were intentionally "going through the motions" to a "pre-ordained result." Since the plaintiff was entitled to have the court "look at the record in the light most favorable to [her]...drawing all inferences most favorable to [her]", *Harlow* at 816, the ultimate fact common to liability and whether the defendants "should have known" they were denying he due process was, obviously, disputed and summary judgment impossible. The lower court held that "it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment are liable for a substantive due process violation" (App. 16-17). Any reasonable official would of course, have to "know" that intentionally "going through the motions" to a "pre-ordained" sanctions result would, most assuredly, be "arbitrary and capricious." Analogously, every police officer is presumed to know that he cannot utilize "excessive force", so a jury must say if it was "excessive." A jury decision on plaintiff's ultimate constitutional liability issue

therefore merged with or became a predicate to any meaningful analysis of the qualified immunity issue. Summary judgment was impossible and the decision below erroneous for this second reason.

Inexplicably, however, the lower court refused to address this issue in its opinion.[13] Petitioner detailed this impermissible refusal to address the constitutional heart of her case in her inbanc petition:

> [T]he panel never applied that ["arbitrary and capricious"] constitutional rule of law to the comprehensive claim that the sanctions were "pre-ordained." That issue is fairly presented, is dispositive, and it must be addressed. (Emphasis in original).

The fact that the court again refused to address the issue--rehear the case--does not, of course, cause the error to disappear. Not being patent in the opinion itself, the error, admittedly, does not

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13 The only hints reflective of the fact that this "pre-ordained" substantive due process argument was plaintiff's principal claim throughout are the court's initial bland characterization of her "claims" (App. 9), and its ultimate conclusion that "[t]he problem with plaintiff's argument is that the factual dispute she identifies concerns the merits of her claim rather than the immunity issue" (App. 21).

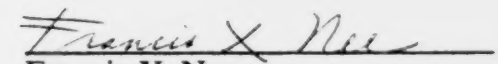
It should also be pointed out that the court erroneously makes it appear (App. 20-22) that plaintiff's principle substantive due process argument was that the defendants did not have an adequate evidentiary basis to censure her. That contention was but one of the links in the skein of unfairness.

have the prospective danger of misleading other courts, as does the first reason to grant the writ. The lower court's decision not to grant petitioner the jury trial to which she was entitled was, nonetheless, "a decision in conflict with the decision[s] of [other] federal court[s] of appeals", Rule 17.1, a decision most unjust to this petitioner, and one warranting remedy in this Court, whereby "an important question of federal law...[may be] settled by this Court." Rule 17.1.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to the United States Court of Appeals for the First Circuit.

Respectfully submitted,



Francis X. Nee
141 Tremont Street
Boston, Massachusetts 02111
(617) 426-4766

Of Counsel:

Daniel F. Featherston, Jr.
141 Tremont Street
Boston, Massachusetts 02111
(617) 426-4766